No. 11390

In the United States Circuit Court of Appeals

For the Ninth Circuit

WILLAMETTE TUG AND BARGE COMPANY, a corporation,

Appellant,

vs.

OLE ERICKSEN and PACIFIC BUILDING MATERIALS COMPANY, a corporation, C. T. SMITH and ESSON SMITH, copartners doing business as C. T. Smith and Son, Claimants of the Tug "CHARLES T", Steamship "KARL LIEBKNECHT",

Appellees.

BRIEF ON BEHALF OF APPELLEES, C. T. SMITH AND ESSON SMITH, COPARTNERS DOING BUSINESS AS C. T. SMITH AND SON, CLAIMANTS OF THE TUG "CHARLES T."

Upon Appeal from the District Court of the United States for the District of Oregon.

THOMAS J. WHITE,
SAMUEL H. BEAR,
Proctors for Appellees
C. T. Smith and Esson Smith, etc.

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SUMMARY OF ARGUMENT

The Appellees, C. T. Smith and Son, contend that the Appellants had the full command and possession of the tug "CHARLES T", and the control over its navigation at the time of the collision that resulted in the damage to the barge "EK-9" complained of by Libelants in their libel; and that having the said command and

possession of the said tug and the control over its navigation at the time and place of the collision, the Appellants were, in fact and in contemplation of law, the charterers pro hac vice of the tug, and as such, are liable over to the Appellees, C. T. Smith and Esson Smith, the general owners and claimants of the tug, for the damages assessed against the tug "CHARLES T", her owners and bondsmen.

STATEMENT OF FACTS

This cause is civil and maritime and is now before this Honorable Court on appeal from the decree entered in this cause against the Appellants, Willamette Tug and Barge Company, an Oregon corporation, by the United States District Court for the District of Oregon, in which court the cause was heard by the Honorable James Alger Fee, District Judge.

As is admitted by the Appellants on page five of their Brief now on file with the Court in this cause, the issues in this appeal stem from one proposition, to-wit:

DID THE ORAL ARRANGEMENT BETWEEN C. T. SMITH AND SON AND THE APPELLANTS CONCERNING THE TUG "CHARLES T" CONSTITUTE A CHARTER PRO HAC VICE, OR WAS IT MERELY A CONTRACT OF TOWING OR AFFREIGHTMENT?

The issue being thus narrowed and the Statement contained in Appellants' Brief at pages two to five thereof having otherwise covered the history of this

case, this statement on behalf of C. T. Smith and Son will be limited to a brief summary of the record and of the issues as we view them and as they relate to the existence of a charter pro hac vice at the time and place of the collision alleged in the Libel and which collision resulted in damage to the barge "EK-9".

C. T. Smith and Esson Smith are copartners doing business under the firm name of C. T. Smith and Son and maintain offices at Stevenson, Washington, and The Dalles, Oregon. The firm operates under certification of the Interstate Commerce Commission, having authority for general towage by towing vessels between all points along the Columbia River and its tributaries from Longview, Washington to Alderdale, Washington, inclusive, but not including the Willamette River above Oregon City, Oregon (R. 84-85, R. 96).

The Appellants operate under certification of the Interstate Commerce Commission and have authority to move commodities generally by non-self-propelled vessels and general towage by towing vessels from points on the Columbia River and its tributaries below Vancouver, Washington, and on the Willamette River below Portland, Oregon, including the ports named (R. 96; R. 103).

The uncontradicted evidence is that Eesson Smith and Arthur A. Riedel, general manager for Appellants, acting on behalf of their respective firms, conducted a telephone conversation as to the use of the tug "CHARLES T" by the Appellants (R. 86; R. 97), and that about a month after the telephone conversation,

the said parties had a meeting in Mr. Riedel's office (R. 86). As the result of the conversations, the tug was moved to Portland, where it was kept, when not in use, at the dock of the Appellants (R. 87). By the terms of the agreement between Mr. Smith and Mr. Riedel, C. T. Smith and Son paid the expenses of the tug and the salaries of the master and crew, as well as the cost of the crew's maintenance (R. 86). The Appellants billed in their own name, without any reference to C. T. Smith and Son (R. 96) and made all collections for the services of the tug (R. 86; R. 97). Smith and Son received 80% of the revenue earned by the tug as determined by the amount of work performed by it and billed by the Appellants under their established tariff (R. 86; R. 97; R. 104). The tug was employed for the most part in moving barges loaded with lend-lease equipment for Russia (R. 103). This type of work Appellants could do under their I.C.C. authority. The Tug also at times was used by the Appellants for moving their own property (R. 77).

There were times when the Appellants placed their own captain aboard (R. 81), and there were times when they directed which channels of the river were to be used by the tug (R. 77). The tug had always before pushed barges, but on this particular tow during which the accident occurred, the captain of the tug was directed by the Appellants to use a towing bridle and to tow the barges (R. 78; R. 82). The undisputed evidence (R. 77) is that during the period covered by the charter, the master of the tug never received any orders from C. T. Smith and Son concerning the use or the navigation of

the tug; such orders came from the Appellants (R. 76).

Admittedly, there is some conflicting evidence in the record, but on behalf of C. T. Smith and Son, it is respectfully urged that the weight of the evidence considered by the trial court fully established the existence of an oral charter pro hac vice as alleged by said Appellees in their petition to bring in the Appellants under Rule 56, Admiralty Rules of Practice. The respective positions of the Appellants and of C. T. Smith and Son are further set forth in paragraph 27 of the pre-trial order (R. 46, 47).

ARGUMENT

The Appellees, C. T. Smith and Son, hereinafter called for convenience and brevity "Appellees", do not question the rule of law cited by Appellants that a charter pro hac vice contemplates a transfer of the entire command, possession and consequent control over its navigation of a vessel, and amounts to a demise of a vessel. Nor, in the main, is there any argument with counsel as to the general rules of law so generously copied from the text of American Jurisprudence, so far as those rules of law are limited to the facts involved in the cases cited in support of that text. The position of the Appellee and the findings and conclusions of the trial court (R. 53) are that there was in fact and in law a charter whereby the Appellees did charter, transfer and deliver to the Appellants the entire custody, management and control of the tug "CHARLES T", including the control over its navigation, and that by reason of the existence of that charter at the time of the collision between the

barge "EK-9" and the Russian steamship "KARL LIEBKNECHT", the Appellants became responsible for the faults in the navigators of the said tug (R. 55) and for the damage done to the "EK-9" in the collision (R. 55, 56). The authorities cited by counsel in their able Brief support the rule that transfer of the entire command, and possession of a vessel and consequent control over its navigation amounts to a demise of the vessel, and that the charterer will generally be considered as owner for the voyage or service contemplated; and as we understand Counsels' Brief, Counsel admit this rule. Authorities in point are:

Frederick J. Middlebrook, 67 Ct. of Claims 294, Cert. denied 280 U.S. 564.
The Charlotte, 285 Fed. 84, 299 Fed. 595.
The City of Everett, 107 Fed. 964.

The evidence establishes without question that Appellees were to pay all operating expenses of the tug, the wages of the master and crew and the cost of the crew's groceries, and great reliance is placed on this evidence by Appellants in their attempt to show the existence of a contract of towage rather than of a charter pro hac vice. The record shows that the trial court was not unmindful of Appellant's position. In the Court's opinion (R. 50) it is stated:

> "There are some circumstances which strengthen this view such as the fact that master and crew were employees of claimants."

However, the fact that the general owner furnishes and pays the master and the crew and furnishes the supplies of the vessel, does not prevent the existence of a

charter pro hac vice.

In *The Charlotte,* 285 Fed. 84, at page 87, the Court said:

> "The fact that the owners were to keep the tug in good condition and repair her when necessary, clean the boilers once in three weeks, and furnish the master and crew and pay them, does not negative the plain import of the charter that from May 15, 1919 to some time between November 15 and December 15, when navigation closed, the tug would be in the possession, management and control of the charterer."

In *The India,* 16 Fed. 262, at page 263, the Court said:

> "That a charterer to whom is given the entire possession, management, and control of the ship, becomes the owner pro hac vice—although, by the terms of the charter party, the general owner appoints the master and selects the mariners, as was the case by the charter party here,—is not doubted, * * * ."

In *United States v. Shea,* 152 U.S. 178 (14 S.C. 519) the Court, in speaking of the legal affect of the charter provision whereby the general owner was to supply the captain and certain other crew members, said on page 190:

> "We think little significance is to be attached to the provision in reference to furnishing a crew or supplying fuel. These were matters of detail affecting the price to be paid, but throwing no light on the question of hiring or control."

Appellants cite on page 31 of their Brief *The City of Everett,* 107 Fed. 964. Appellees claim for this case that it is authority for the rule above set forth, and especially so when, as in the case at bar, it is contended, as the

Appellees do contend, that the captain was under the orders and direction of the charterers.

Another case in point is *The Bombay,* 38 Fed. 512.

On page 12 of Appellant's Brief the point is made that the evidence in the record is silent as to the duty to make repairs. But the mere fact that the general owner keeps the vessel in repairs does not negative the existence of a charter pro hac vice. *The Charlotte,* 285 Fed. 84, at page 87.

On page six of the Brief the statement is made that there is no testimony in the record as to how long the arrangement between Appellants and Appellees were to last. On behalf of Appellees it is submitted that it is not important to the existence of a charter pro hac vice that there be a definite time stated in the charter.

In *United States v. Shea,* supra, when considering the effect of a charter provision that the owner was to furnish the vessel " * * * whenever called upon during the fiscal year ending June Thirtieth, eighteen hundred and eighty-seven, * * *" the Court said on page 190:

> "That the time for which the vessels were to be employed might be limited by the wishes of the government does not affect the question as to whether, while so employed, they were to be under its exclusive control and management. A demise may be for a day as well as for a year, and may be terminable at the will of the lessor."

The record, however, does contain the undisputed testimony that the tug was to be under charter to the Appellants for "approximately two months" (R. 87).

Appellants lay great stress on the fact that Appellees were to be paid for the use of the boat a percentage, 80%, of the earning of the vessel while the same was being used by the Appellants. Yet it has been held that the facts that the general owner is paid out of the revenue of the vessel is not important or controlling on the issue of whether a charter or a contract of towage exists.

In *The Nate E. Sutton,* 42 F. (2d) 229, at page 231, the Court said:

> "The compensation of the operator was fixed at 5 per cent. of the net profits. But the substitution of this for fixed compensation to the owner did not affect the dominion or control over navigation, so long as the agreement remained in effect."

The same rule was applied in *Webb v. Peirce,* Federal Case No. 17320, where it appears that the vessel was let "on shares" under an oral agreement, for an indefinite period of time.

Appellants contend that some weight is to be given to the support of their position by the fact that the agreement between the Appellants and the Appellee was oral. On behalf of Appellees, it is contended that a charter for a vessel can be oral. Authorities in point are the following:

The R. Lenahan, Jr., 43 Fed. (2d) 858.
James V. Brophy, 71 Fed. 310.
Quirk v. Clinton, Federal Case No. 11518.

In the last cited case the court said:

> "But it is not necessary under the law merchant to have a specific engagement in writing to constitute the legal letting of a ship; a hiring without a writing is valid."

Neither are "technical words necessary to create a demise". *United States v. Shea,* supra, at page 189. The essential thing is to construe the agreement correctly in connection with the actions of the Appellants and the Appellee. *The R. Lenahan, Jr.,* 43 Fed. (2d) 858, page 862.

That the Appellants and the Appellees intended the agreement as a demise and not as a contract of towage is evidenced by what they did, in fact, do.

The testimony of Esson Smith, called on behalf of Appellees, establishes that his firm (a copartnership consisting of himself and his father (R. 84), is engaged in the log towing business (R. 84). The firm has I.C.C. general towing rights, but has no authority to tow below Longview, Washington, but Mr. Smith testified that he, himself, had been below Longview "a couple of dozen times" and knew the thread of the channel (R. 85). Mr. Smith represented his firm in making the arrangements with the Appellants (R. 85). As to this arrangement, Mr. Smith testified (R. 86, 87) as follows:

> "A. About thirty days before the boat went down there I had a conversation with Mr. Riedel over the phone in regard to the charter of the boat and he said that we would get together at a later date, and on April 4, 1945, I went to Mr. Riedel's office—rather, he called me two days before that, that he wanted the boat the next day, and I went down to his office and talked to him about it and we agreed that he would charter the boat and I would pay all operating expenses connected with it, Diesel oil and lube oil and groceries, wages, and that I was to take 80 percent. of the gross revenue earned by the boat; Willamette Tug and Barge

were to do all the collections, make all the collections, make all the billings, and pay on the 10th of the following month.

Q. Now, was that your contract or agreement with Willamette Tug and Barge concerning the use of this vessel?

A. It was.

Q. Now, did you know what the Willamette Tug and Barge Company was going to do with this tug?

A. No. I had a general idea as to what they were going to do. I wouldn't say that I did know each move that they were going to make. I knew that they were going to handle barges with it.

Q. You knew the general nature of the business of the Willamette Tug and Barge Company?

A. Yes.

Q. Now, how long was the tug under charter to the Willamette Tug and Barge Company?

A. Approximately two months."

Mr. Smith also testified (R. 87) as follows:

"The Court: Where was it kept?

Mr. White: Q. Where was the tug kept?

A. Well, in Mr. Riedel's and our conversation, that tug was to be kept at his dock, at their moorage, because he said that his boats were kept at Tracey's moorage and he would be on a par with Portland Tug & Barge and other operators in that zone on the charges. In other words, if his boats ran from one zone to another it would cost the customer more, so he specifically stated that he wanted that boat kept at his moorage.

Q. Was that part of the agreement?

A. Yes.

Q. Now, during the period that the Willamette Tug and Barge Company had this tug, the Charles T., did you ever inspect the boat or look at the boat?

A. I never was aboard it until the day it left Portland.

Q. What instructions did you give Captain Bates concerning the use of this tug by the Willamette Tug and Barge Company?

Mr. Recken: We will enter our same objection, your Honor.

The Court: I will take the testimony, subject to the objection.

Mr. Recken: Yes.

Mr. White: Answer the question, please.

A. I told Mr. Bates to take the boat to the Willamette Tug and Barge's moorage and that he would receive his instructions there.

Q. Now, did you ever give Mr. Bates any instructions concerning the operation or navigation of this tug?

A. No.

Q. Excuse me—during the time that the Willamette Tug and Barge had the tug?

A. No."

In Appellant's Brief (pages 12, 13) the point is made that the Appellee cashed without protest a check made out in payment "for towing". Mr. Smith, in his testimony, gives the following explanation of that matter (R. 89):

"Mr. Recken: And the counter, the copy. I believe they are both together.

Q. I wish you would examine that check and also the copy.

A. Yes.

Q. And it is noted on there that it is for towage, isn't it, for the month of April?

Mr. White: If the Court please, I will object to that question on the same ground that Mr. Recken previously objected to my question. These are checks of the Willamette Tug and Barge Company. It has their writing thereon. They are nothing more than self-serving declarations.

The Court: Received, subject to the objection.

Mr. Recken: Q. Is that correct?

A. This is a check written out by Willamette Tug and Barge Company to C. T. Smith and Son in the amount of dollars, and the invoice says "for towing". However, that is their writing, and at that time there was no trouble between Willamette Tug and Barge and Smith and Son, and I accepted the money.

Q. Well, you cashed the check?

A. That is right.

Q. Before the 10th of May, knowing that it was for towage, and you made no objection whatsoever to that, did you?

A. I cashed the check.

Q. You never complained to Mr. Riedel or any Willamette Tug and Barge official that that was incorrect or wrong?

A. Well, I don't see that the wording of a bill written by - * * * ."

Mr. Smith further testified (R.90) in answer to questions by Mr. Recken:

"Q. I hand you Pre-Trial Exhibit No. 14 and ask what that is?

A. It is a bill rendered by C. T. Smith and Son to Willamette Tug and Barge Company for $2654.67 which they have not paid.

Q. And that bill was made up by C. T. Smith and Son on the log which was furnished to you by your captain?

A. This bill was made up by going—I had a copy of the log made by my captain and I went to the dispatcher at the Willamette Tug and Barge Company's office and went over the moves with him to see that we had the right amount of moves and that I got the right amount of dollars out of the job. Willamette Tug and Barge never at any time gave me a copy of any of their billings or anything else. I had no way to find out how much money they owed me other than the log."

The above testimony estiblished that Appellees retained no control over the movements of the tug; and while there is, as is pointed out by Appellants, some testimony in the record contradicting, in part, this testimony, the fact remains that this is a cause in admiralty and that the trial judge saw and heard the witnesses. Furthermore, there is other evidence in the record in support of the findings of the trial court.

On this point, Captain Charles Richard Bates testified as follows (R. 76, 77, 78):

> "A. Well, when I got there I was to take further orders from the Willamette Tug and Barge; they had the rest—we was just to go to there and they give the rest of the orders, that was all.
>
> Q. What date was that?
>
> A. Well, I don't know exactly what date it was.
>
> Q. Prior to the collision approximately how long was it?
>
> A. Oh, a month, anyway.
>
> Q. A month, anyhow?
>
> A. Yes.
>
> "Q. Now, during that period from the time that you took the boat to the Willamette Tug and Barge Company to the time of the collision who did you take your instructions from?
>
> A. The company, you mean? I took it from the dispatcher of the Willamette Tug and Barge and once in a while from Mr. Riedel.
>
> Q. How were these orders given to you?
>
> A. Well, some of it was given orally and some of them they wrote it out on a little piece of paper, where I was to go.
>
> Q. Did they tell you how to do your work, in addition to where to go?
>
> A. Why, yes, in a way they did, told us where to go and how to—once in a while they would tell us which way to go, like down through the slough

if they was having a trial run on the river there with ships.

Q. They would tell you what channels to use, is that right?

A. Yes.

Q. Did you ever do any miscellaneous work, such as furnishing supplies for Willamette Tug and Barge Company's other boats?

A. Doing what?

Q. Did you ever get, say, any oil drums for other boats of the Willamette Tug and Barge?

A. Yes, we have run over to the oil docks and brought over a barrel of oil for the barge, and stuff like that, just run around and—

Q. Now, during this period the boat was—pardon me, I will reframe my question. Where was the boat kept during this period when not in use?

A. At their moorage, tied up at their moorage.

Q. At whose moorage?

A. The Willamette Tug and Barge.

Q. Was the boat during that period ever at the moorage of C. T. Smith and Son?

A. No, it was not.

Q. Where is their moorage?

A. C. T. Smith and Son, you mean?

Q. Yes.

A. It is at Stevenson, Washington.

Q. Did you during that period ever receive any orders concerning the navigation of the boat or any other orders pertaining to the Tug "Charles T" from Esson Smith or C. T. Smith?

A. No, I never.

Q. Now, on the day of the collision, when you were preparing the boat to tow the three barges, one of which was involved in the collision, did the officials of the Willamette Tug and Barge Company give you any special orders relative to the making up of the tow?

A. Well, they told us to take them down on a towline, and asked us if we had a bridle, and we never had no bridle, so they says get the one they had on the Henry J. That is one of their own tugs.

Q. They furnished you the towing bridle?
A. Yes.
Q. How do you usually move barges?
A. Push them on the bow of the boat, on one side.
Q. And who gave you these orders to use a towing bridle?
A. Howard Brands, I believe the name was, Mr. Howard Brands.
Q. And who was he?
A. He was a dispatcher for the Willamette Tug and Barge."

This testimony of Captain Bates relative to the manner of towing the three barges on the trip during which the collision occurred is uncontradicted and is further supported by that of Lloyd Chappell (R. 82).

It is to be noted also that after the collision that damaged the "EK-9", Captain Bates reported to and received his instructions from the Appellants (R. 79).

On redirect examination, Captain Bates testified as follows (R. 81):

"Q. Captain, did the Willamette Tug and Barge Company ever furnish one of their pilots to go on the boat?
A. Yes, when they told us to go down the slough, why, I had never been down the slough before, and they furnished a captain to go down."

The undisputed evidence is that the Appellants made the contracts for the services performed by the tug and billed their customers in their name and under the tariffs published by the Columbia River Tariff Bureau, of which Bureau the Appellants were a participating carrier (R. 102, 103, 104).

As part of Appelees' case, there was read into the record (R. 96) a reference to two reports of the Interstate Commerce Commission: Volume 250 at page 812 under Docket No. W-425 and at page 818 of the same volume under Docket No. W-643. As to the competency of these reports as evidence in the courts of the United States without further proof or authentication, reference is here made to Title 49, Section 14 (3) U.S.C.A. Reference is also made to Section 917 (a) Title 49, U.S.C.A. making a violation of an order, or of any term or conditions of any certificate or permit issued by the I.C.C., unlawful.

Appellees have no authority from the I.C.C. for performing towing services below Longview, Washington. Neither have Appellees authority from the I.C.C. to transport commodities on non-self-propelled vessels. The undisputed evidence is that the tug was employed towing from Portland to Beaver, a place 12 miles below Longview. (R.78) and that in so doing the tug was "back and forth several times from the Washington side to the Oregon side". (R.79). That these operations performed by the tug were in interstate commerce and subject to control by the I.C.C. seems clear from the holdings in *Cornell Steamboat Co. v. United States,* 53 Fed. Supp. 349, 321 U.S. 634. Certainly, as Appellants point out in their brief, they have the right to obtain a boat from another carrier, and to make use of that boat over territory and in the transportation of commodities which the owner of that boat may not be certificated to do. This was the very point that Appellees make, since the use of the tug was in a trade which the owner could

not legally engage in and must have therefore been conducted under the authority of Appellants, a trade which they could and did engage in under authority granted by the Interstate Commerce Commission. The evidence is uncontroverted that the billing and all other relationships with the shipper were controlled by the Appellants, and these facts, together with trade in which the boat was engaged, is indicative of the control these appellants must necessarily have had under these circumstances to fulfill their obligations and responsibilities to the shippers. For Appellants to say they had no control would be most inconsistent with this evidence.

In the case at bar, the Court stated in its opinion (R. 50) that the Appellants' own boats, or those under demise, could, under Appellants' license, go below Longview. This same thought is also found expressed in paragraph VII of the Findings of Fact (R. 53, 54). The argument on these facts is that both the Appellants and the Appellees are entitled to the presumption that they intended to do a lawful act, and that if of two methods of accomplishing an obpect, one was lawful and the other unlawful, it would be presumed that the lawful method was intended.

Be that so it may, the fact remains that on the voyage that resulted in the damage to the "EK-9", the Appellants did furnish the towing bridle and did instruct the master of the tug as to the method of moving the tow. The Appellants did exercise control over the master and, of course, the tug.

Appellants in their Brief cite at great length certain

cases decided in the Supreme Court of Oregon. With all due respect to that court, and regardless of what those cases may be said to hold, the fact remains that those cases are not controlling in a court of admiralty; for the law in this Circuit is clear that federal courts sitting in admiralty are not bound by state statutes or by state decisions. Counsel misconstrues the case of Watts v. Camors, 10 Fed. 145, for that case is direct authority, as we read it, for the rule that in the admiralty and maritime jurisdiction, the federal courts follow the general principles of the maritime law as they are recognized in the commercial world, rather than the narrow, local law that may happen to prevail where a charter party happens to be made. Other cases in point are:

The Thielbek (CCA 9), 241 F. 209.
Swayne & Hoyt v. Barsch (CCA 9), 226 F. 581.
Knickerbocker Ice Co. v. Stewart, 253 U.S. 149, 40 S.C. 438.

From these authorities, it seems clear that where the admiralty and maritime law applicable to the instant case conflict with the Oregon cases, the Oregon cases cease to be authorities.

And after all, the Oregon cases cited, as indeed do the other cases cited by counsel, agree that where the charterer has the control, management and navigation of the vessel, he is held to be the charterer pro hac vice.

The contention of Appellee is that the control, management, and navigation of the tug were transferred to the Appellants and that the master of the tug was at the time of the collision a mere sailing master.

CONCLUSION

On behalf of Appellee, it is respectfully submitted that the trial court, having seen and heard the witnesses, and having seen and examined the exhibits introduced in the record, and, with that evidence before it, having considered the facts and the law applicable thereto, its decree should be affirmed. *U. S. v. Lubinski* (CCA 9) 153 F. (2) 1013, at page 1014.

Respectfully submitted

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